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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

Brian Goodine,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 21 U.S.C. 841, is drug quantity an element of the offense or instead a sentencing factor?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Goodine respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-15a) is published at 326 F.3d 26. The district court's order sentencing petitioner (Pet. App. 16a-21a) is unpublished.

RELEVANT STATUTORY PROVISION

21 U.S.C. 841 is reproduced in relevant part in the court of appeals' opinion (at 9a-10a n.4).

JURISDICTION

The First Circuit entered its opinion on April 9, 2003, and denied rehearing and rehearing en banc on May 19, 2003 (Pet. App. 22a). Justice Souter subsequently extended the time to file this petition to and including October 16, 2003. App. No. 03-117. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

This case raises a critical issue, on which the circuits are avowedly split, regarding the single most frequently utilized provision of federal criminal law. The provisions of the principal federal drug statute – 21 U.S.C. 841 ("Section 841") – are defined based on drug quantity and type. The courts of appeals are intractably divided over whether drug quantity is an element of the offense that must be found by the jury beyond a reasonable doubt or instead a sentencing factor that the judge may determine based on a preponderance of the evidence. "[M]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment,

submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones* v. *United States*, 526 U.S. 227, 232 (1999). The current inconsistent patchwork of lower court rulings produces an intolerable disparity in the treatment of tens of thousands of similarly situated criminal defendants every year.

1. Section 841 makes it unlawful, *inter alia*, to manufacture, distribute, dispense, or possess a controlled substance. 21 U.S.C. 841(a). Subsection (b) of the statute identifies particular controlled substances, quantities of drugs, and resulting punishments. Subsection (b)(1) governs most drugs, including the one at issue in this case, cocaine base. Subsections (b)(1)(A), (B), and (C) address progressively smaller drug quantities and impose progressively smaller sentencing ranges.

2. A federal jury convicted petitioner Brian Goodine on two counts of possessing and conspiring to possess cocaine base in violation of Section 841. The jury returned a special verdict form specifically finding that petitioner was responsible for between five and fifty grams of cocaine base, rejecting a finding of responsibility for over fifty grams. For this quantity, given petitioner's prior criminal history, subsection (b)(1)(B) subjected him to a term of imprisonment of ten years to life, a term exceeding the applicable Sentencing Guidelines range. Thus, exactly ten years was the only possible sentence "[s]trictly following the jury's conviction" (Pet. App. 3a); a sentence above ten years would have been barred by the Guidelines, from which the court could only depart as necessary to comply with the statutory minimum.

Over petitioner's timely objection, however, the district court disregarded the jury's drug quantity finding – *viz.*, that petitioner had been responsible for less than fifty grams – and refused to sentence petitioner under subsection (b)(1)(B) consistent with the verdict. Instead, it found by a preponderance of the evidence that petitioner was responsible

for more than 300 grams of cocaine base. On this finding, subsection (b)(1)(A) subjected petitioner to a term of imprisonment of twenty years to life. The district court imposed the mandatory minimum term of twenty years, which was 120 months greater than the sentence of ten years months that could have been imposed pursuant to the jury's contrary finding of drug quantity.

3. Petitioner appealed, arguing that the district court was required to sentence him based on the jury's findings. Specifically, petitioner contended that Section 841(b) sets forth elements of the offense rather than sentencing factors. The First Circuit acknowledged the square "split among [its] sister circuits" on the question, Pet. App. 5a, and joined those circuits holding that the statute merely establishes sentencing factors, which the judge may find based on a preponderance of the evidence. *Id.* 9a-13a.

According to the First Circuit, drug quantity is a "classic sentencing factor" (Pet. App. 11a) and, under Section 841 in particular, "goes to how the offense is conducted" but is "not necessary to the determination of whether [the] defendant's conduct is criminal or innocent" (*id.* 12a). Textually, the court reasoned that the statute's structure and its headings indicate that "part (a) identifies a crime and part (b) outlines different penalties for that crime." *Id.* 11a. Although the court opined that the "legislative history on this point is scarce, and others have found it unhelpful," it nonetheless relied on a single passage in a congressional report broadly describing "'sentencing procedures' as giving 'maximum flexibility to judges.'" *Id.*

After the court of appeals denied rehearing and rehearing en banc, this petition followed.

REASONS FOR GRANTING THE WRIT

The First Circuit properly recognized the "split among [its] sister circuits" over whether Section 841(b) makes drug quantity an element of the offense or instead a sentencing

factor. Pet. App. 5a. The courts of appeals have adopted three approaches. The D.C. and Ninth Circuits apply a rule under which petitioner unquestionably would have prevailed: they hold that the statute defines drug quantity as an offense element that must always be found by the jury beyond a reasonable doubt. Other circuits, including the First Circuit below, hold that the statute defines quantity in all cases as a sentencing factor that the judge may determine by a preponderance of the evidence. These circuits hold that the only restriction on the district court's ability to make its own findings and impose a sentence accordingly is the *constitutional* rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), that the court may not impose a sentence that exceeds the statutory maximum under the jury's findings. Still other circuits reach essentially the same result by holding, as a matter of statutory interpretation, that Section 841(b) makes drug quantity an element only in those cases in which the Constitution would require a jury finding in any event – *i.e.*, in cases implicating the *Apprendi* rule.

Certiorari is warranted to resolve this conflict, which is of indisputable importance. Tens of thousands of individuals are charged under Section 841 each year. The inconsistent treatment of these defendants is intolerable. Deferring resolution of the circuit split until a later date would invite the chaos of innumerable collateral attacks to Section 841 convictions. This is furthermore an ideal vehicle in which to resolve the conflict, because it is outcome-determinative here and because petitioner properly preserved his objection that he must be sentenced under subsection (b)(1)(B) based on the jury's findings.

I. The Circuits Are Split Over Whether Section 841(b) Defines Drug Quantity As An Element Of The Offense Or Instead As A Sentencing Factor.

1. Petitioner would have prevailed in the D.C. and Ninth Circuits. In *United States* v. *Graham*, 317 F.3d 262 (2003) (Randolph, Rogers, & Williams, JJ.), the D.C. Circuit,

applying its settled rule that Section 841(b) sets forth offense elements, invalidated the part of the defendant's sentence that was inconsistent with the jury's verdict. Notwithstanding that the issue of drug quantity had never been submitted to the jury, the district judge had found Graham responsible for five or more grams of cocaine base, and accordingly had sentenced him under Section 841(b)(1)(B), which imposed a mandatory term of five years of supervised release. If Graham had been sentenced for an unspecified quantity pursuant to Section 841(b)(1)(C), by contrast, he would have been subject to a mandatory minimum of just three years' supervised release.

The D.C. Circuit first held that the supervised release component of Graham's sentence did not violate *Apprendi*'s constitutional rule, because it did not exceed the statutory maximum that could have been imposed based on the jury's finding that Graham was responsible for an unspecified drug quantity. 314 F.3d at 273-74. But it nonetheless ruled for Graham, finding that the district court's ruling constituted plain error because the sentence violated the *statute*:

> [T]he question becomes whether drug quantity is an element of the offense defined in § 841, such that it must be submitted to the jury to be determined beyond a reasonable doubt, and a defendant must be convicted of violating a particular subparagraph of § 841, as argued by Graham. The alternative position * * * is that drug quantity is merely a sentencing factor, to be determined by the district court at sentencing based on a preponderance of the evidence * * *.
>
> * * * [T]his court [has] interpreted § 841 as a tripartite statute establishing three separate offenses, with different maximum sentences based on drug quantity, and not a unitary statute with drug quantity as a sentencing factor. * * * Consequently, in light of [D.C. Circuit precedent], the district court, in sentencing Graham, could not treat subparagraphs (A) and (C) of §

> 841 as mere sentencing factors, and to the extent it did it erred.

317 F.3d at 274-75 (internal citations omitted). The D.C. Circuit furthermore found the error prejudicial and accordingly remanded. "[T]he district court in sentencing Graham appears to have tracked the mandatory minimum sentencing provisions of § 841, and thus may have applied § 841(b) (1)(A), which increased Graham's supervised release period by two years." *Id.* at 275.[1]

The D.C. Circuit in *Graham* thus definitively held that Section 841 makes drug quantity an element that must be submitted to the jury regardless of whether *Apprendi* error is present. This holding rested on the court's settled precedents. In *United States* v. *Webb*, 255 F.3d 890, 896 (2001) (Ginsburg, C.J.; Sentelle & Garland, JJ.), the court confronted "whether § 841 is properly interpreted as a unitary (one crime with a life maximum) or tripartite (three crimes with three increasing maxima) statute." Following a prior D.C. Circuit decision, *United States* v. *Fields*, 242 F.3d 393, *as amended on rh'g*, 251 F.3d 1041 (2001) (Edwards, C.J.; Ginsburg & Tatel, JJ.), the court held that Section 841 was tripartite. *Webb*, 255 F.3d at 896. The court in *Webb* accordingly held that drug "quantities constitute elements of the charged offenses" under subsections (b)(1)(A) and (B), "and by failing to submit them to the jury, the district court erred." *Id.* at 900. But the court held that the district court's error was not reversible under the plain error standard because "the evidence of drug quantity was overwhelming and uncontroverted." *Id.* at 902. See also *United States* v. *Singleton*, 177 F. Supp. 2d 31, 34 (D.D.C. 2001) (In the D.C. Circuit, "courts can no longer treat drug quantity as a

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[1] The D.C. Circuit found that the defendant's term of imprisonment did not require reversal because (unlike in petitioner's case), the prison term imposed fell within the range permitted by the jury's verdict under the statute and the Sentencing Guidelines. See *Graham*, 317 F.3d at 273-74.

sentencing factor because *in a particular case* the judge *could* find by a mere preponderance that a sufficient quantity of drugs was involved to trigger the statutory minimums and maximums set forth in Section 841(b)(1)(A) or (B), thereby resulting in a prison term beyond the 20-year statutory maximum set forth in Section 841(b)(1)(C). The question of drug quantity therefore now is treated as an element of the offense that must be decided by the jury beyond a reasonable doubt." (citing *Webb*, 255 F.3d at 896) (emphases added)).

The Ninth Circuit similarly holds that drug quantity is an element of the offense under Section 841. In *United States* v. *Buckland*, 289 F.3d 558, 564-68 (2002) (en banc), the court so held based on a study of the statutory text, construed in light of the fact that a contrary conclusion could render the statute unconstitutional under *Apprendi* by permitting judges to impose sentences that exceed the otherwise-applicable statutory maximum. The court accordingly overruled its own pre-*Apprendi* holding that drug quantity was a mere sentencing factor, noting that this interpretation had never been based in the statutory text or the legislative history. *Id.* at 565 (finding no "persuasive legislative history that shows Congress clearly intended" quantity findings to be made by sentencing courts). Accordingly,

> Congress and courts may have understood or accepted that, as a matter of procedure, drug quantity could be decided by a judge, not a jury. Such an understanding, however, does not represent the same kind of pellucid legislative purpose and intent found in the New Jersey statute struck down in *Apprendi*. * * * Thus, because our reading of the statute is 'fairly possible,' we are obliged to so construe it.

Id. at 567.

Although *Buckland* concerned a facial challenge to the statute's constitutionality, the Ninth Circuit has subsequently held that failure to submit drug quantity to the jury constitutes reversible error even in cases in which the sentence issued did

not exceed the statutory maximum for an unspecified quantity. See *United States* v. *Velasco-Heredia*, 319 F.3d 1080, 1084-87 (2003) (rejecting as "too clever by half" the government's argument that the error was harmless because the sentence was within the range statutorily authorized by the jury's verdict). In *Velasco-Heredia*, the court held that because the mandatory minimum sentence imposed in that case exceeded the maximum sentence that the court could have imposed, pursuant to the Sentencing Guidelines, for an unspecified quantity, the prejudice to the defendant was obvious: "not only was the error not harmless, it was demonstrably harmful to this defendant." *Id.* at 1086.[2]

Petitioner would accordingly have prevailed in the D.C. and Ninth Circuits. The D.C. Circuit's decision in *Graham*, in particular, is indistinguishable from this case. Both here and in *Graham*, the court sentenced the defendant to a mandatory minimum sentence based on a judicial finding of drug quantity that, although it did not exceed the statutory maximum permissible under the jury's verdict, exceeded the maximum sentence permitted by the jury's verdict. Indeed, the only distinctions make petitioner's case even stronger than Graham's was: here, harmless rather than plain error review applies, since petitioner preserved his objection below; and here, the jury made a specific finding as to drug quantity that was disregarded by the court, obviating the need to inquire as to what the jury would have found had the issue been submitted to it.

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[2] The Eighth Circuit has suggested that it agrees. In *United States* v. *Bradford*, 246 F.3d 1107, 1115 (2001) (per curiam), the court vacated and remanded the sentence of one defendant (Banks), because the district court indicated that (as in petitioner's case) it was applying its own finding of drug quantity to impose a mandatory minimum sentence that exceeded the sentence that would have been imposed if the judge had followed the jury's verdict.

2. By contrast, other courts of appeals agree with the First Circuit's holding in this case. The Seventh and Eleventh Circuits hold that Section 841(b) sets forth sentencing factors, and *never* requires drug quantity to be determined by the jury. See Pet. App. 9a-13a; *United States* v. *Smith*, 308 F.3d 726, 740-41 (CA7 2002); *United States* v. *Sanchez*, 269 F.3d 1250, 1267-70 (CA11 2001). Each of these courts recognizes that, as a matter of federal constitutional law, *Apprendi* forbids the judge from making findings that would result in a sentence exceeding the maximum statutory penalty that could have been imposed based on the facts found by the jury. This limit, in these courts' view, is an "external constitutional restraint" that has no bearing on the proper construction of the statute itself. *Sanchez*, 269 F.3d at 1268 (holding that "*Apprendi* did not announce any new principles of statutory construction").

The Second, Fifth, and Sixth Circuits have adopted a different rationale, but one that ultimately produces the same result. These courts hold that Section 841(b) sets forth elements of the offense. But they inexplicably apply that rule only when the sentence imposed by the judge exceeds the maximum statutory penalty that could be imposed based on the jury's findings and therefore violates *Apprendi*. See *United States* v. *Darwich*, 337 F.3d 645, 655 (CA6 2003); *United States* v. *Mendoza-Gonzalez*, 318 F.3d 663, 673 (CA5), cert. denied, 123 S. Ct. 2114 (2003); *United States* v. *Thomas*, 274 F.3d 655, 663-64 (CA2 2001) (en banc). These courts have thus adopted a hybrid statutory interpretation, holding that drug quantity is a mere sentencing factor in cases in which it does not affect the maximum sentence. See, *e.g.*, *United States* v. *King*, No. 02-1460, 2003 U.S. App. LEXIS 19280, at **7-8 (CA2 Sept. 17, 2003) (explicitly rejecting an argument that "drug quantity and type are now elements" in cases not involving an increase in the statutory maximum).

Still other courts have failed to articulate their positions clearly, leaving district courts without any guidance. The Tenth Circuit holds that drug quantity is an element of the

offense, but has not specified whether that holding is limited to cases in which the judge's findings trigger *Apprendi*. See *United States* v. *Cernobyl*, 255 F.3d 1215, 1218 (2001). And the Third and Fourth Circuits have held as a matter of constitutional law that juries must make drug quantity findings when required by *Apprendi*, but they have avoided resolving the statutory construction question presented by this case. See *United States* v. *Vazquez*, 271 F.3d 93, 98 (CA3 2001); *United States* v. *Promise*, 255 F.3d 150, 156-57 (CA4 2001).

Certiorari should be granted to resolve this conflict.

II. The Decision Below Was Erroneous.

Certiorari is also warranted because the First Circuit's decision below is wrong on the merits. The most thorough post-*Apprendi* judicial analysis of the proper construction of Section 841 is that of then-Chief Judge Becker, concurring in *United States* v. *Vazquez*, 271 F.3d 93, 107-16 (CA3 2001). Chief Judge Becker identified several factors that confirm that the statute defines drug quantity as an element of the offense in all cases. First, the text and structure of the statute demonstrate that Section 841(a) alone cannot be viewed as defining a complete crime, because it includes no punishment. Other courts, including the First Circuit in this case, rely on the fact that the *heading* of Section 841(a) addresses "crimes," while that of 841(b) addresses "penalties." *Id.* at 110-11. But these headings were created not by Congress but by the Office of the Federal Register, and thus do not carry the force of law. *Id.* at 111-12.

In addition, Chief Judge Becker undertook a comprehensive review of the legislative history, including the committee reports accompanying each of the major amendments to the Controlled Substances Act of 1970, which point to Congress's intention to define multiple offenses in a single statutory provision. 271 F.3d at 109-10. Moreover, the Justice Department itself, in publications contemporaneous with the adoption of the current version of Section 841,

interpreted that statute as establishing separate offenses and stated that drug quantity should be included in the indictment and proven at trial. *Id.* at 110. Chief Judge Becker also contrasted the striking absence of language in Section 841 committing determination of drug quantity to the sentencing judge with the presence of just such language in other statutes. *Id.* at 111. Finally, Chief Judge Becker pointed to the massive variation in sentences – which can sometimes be measured in orders of magnitude – triggered by different findings of drug quantity, noting that this Court has repeatedly relied on much smaller sentencing differentials in determining that a particular fact is an element that must be proven at trial. *Id.* at 109-13; see *Castillo* v. *United States*, 530 U.S. 120, 127 (2000) (relying on a sixfold difference in the applicable punishment); *Jones*, 526 U.S. at 233 (citing a two-thirds increase in punishment). Although concluding that these factors were sufficient to make Congress's intention "clear" (271 F.3d at 113), Chief Judge Becker also recognized that his conclusion was supported by the canon of constitutional doubt, in light of the concerns raised by *Apprendi*. *Id.* at 113-14.

In addition to demonstrating the flaws in the First, Seventh, and Eleventh Circuit's holding that Section 841 always makes drug quantity a sentencing factor, Judge Becker's analysis makes evident the fatal weakness of the Second, Fifth, and Sixth Circuits' rather bizarre conclusion that the statute makes it a sentencing factor in some cases, but an element in others. This approach – which confuses the tasks of constitutional and statutory interpretation – depends on the extraordinarily unlikely proposition that Congress, in drafting Section 841, *anticipated* the *Apprendi* distinction and furthermore implicitly intended the statute to track that distinction. See 271 F.3d at 113-14 (stating that such an interpretation "strains credulity," and observing that "we can be sure that Congress did not intend to design § 841 to fit precisely within the contours of a constitutional rule that did not yet exist. It is much more likely that Congress intended

for drug type and quantity always to be elements of a § 841 offense."). Moreover, as a practical matter, the Second, Fifth, and Sixth Circuits' approach leaves the basic question of what constitutes the crime with which a defendant is charged to be determined only *ex post facto*, after sentencing – an approach that provides no guidance to courts and parties as to what facts must be included in an indictment and what evidence needs to be introduced at trial.

III. The Conflict Merits Resolution In This Case.

The conflict over whether drug quantity under Section 841 is an element of the offense or a sentencing factor is indisputably of sufficient importance to merit review in this Court. Section 841 is the principal federal drug statute. No provision of the federal criminal code is employed more frequently. See U.S. Sentencing Comm'n, Sourcebook of Federal Sentencing Statistics, 2001 Fiscal Year (reporting that in fiscal year 2001, more than twenty thousand persons were sentenced for federal drug offenses pursuant to the Sentencing Guidelines – 41.2% of the *total* number of sentenced guideline offenders). Furthermore, "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones* v. *United States*, 526 U.S. 227, 232 (1999). The present disparity in the treatment of similarly situated defendants is accordingly intolerable.

Moreover, this case is an ideal vehicle with which to decide the question presented. In contrast to many similar petitions to this Court, here there is no doubt that the circuit conflict is outcome-determinative on these facts. The jury made a specific finding regarding the quantity of drugs for which petitioner was responsible. The guideline range to which petitioner was subject under the jury's findings is furthermore clear. By contrast, many other cases involve a dispute – which is inevitably irresolvable at the certiorari

stage – over whether the error is "harmless," with the government arguing that there was overwhelming evidence to sustain the judge's finding and the defendant arguing that the jury would have found a smaller drug quantity.

This is furthermore an ideal vehicle because it is a preserved error case. In many other Section 841 challenges, the defendant-petitioner has failed to argue below that the statute establishes elements of the offense rather than sentencing factors. The government in these cases contends that, even if Section 841 establishes elements of the offense, the failure to put the issue before the jury was not "plain error." Such disputes will cloud whether other cases are appropriate vehicles to resolve the question presented.

Finally, not only is the disagreement over the proper construction of Section 841 already thoroughly ventilated in the courts of appeals, but principles of sound judicial administration also mandate that the conflict be resolved promptly. If this Court defers ruling on the question presented, it will invite the same "considerable juridical chaos" (*Monge* v. *California*, 524 U.S. 721, 740 (1998) (Scalia, J., dissenting, joined by Souter & Ginsburg, JJ.)) and "judicial havoc" (*Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting, joined by Rehnquist, C.J. & Ginsburg, J.)), that followed its holdings in *Bailey* v. *United States*, 516 U.S. 137 (1995), and *Bousley* v. *United States*, 523 U.S. 614 (1998). In *Bailey*, having deferred deciding the question for many years, this Court finally held that "use" of a firearm under 18 U.S.C. 924 did not include "carrying" the weapon. 516 U.S. at 143. In *Bousley*, the Court recognized that *Bailey* must be applied retroactively (a conclusion that would also follow from any ruling on the question presented by this case) (523 U.S. at 621), and the courts of appeals subsequently uniformly held that *Bousley* commences a new one-year statute of limitations for bringing collateral challenges under the AEDPA. See *Pryor* v. *United States*, 278 F.3d 612, 613 (CA6 2002) ("join[ing] other circuits holding that the [AEDPA] limitations period commences with

the *Bousley* decision"). The result was a torrent of litigation in the lower courts. Cf. *United States* v. *Mack*, 229 F.3d 226, 244 n.9 (CA3 2000) (Becker, C.J., concurring) ("According to a Westlaw KeyCite performed August 30, 2000, *Bailey* has already been judicially cited 1893 times. It has also led to numerous re-sentencing proceedings."). It is essential that the question presented be resolved now rather than placing on the lower courts the similar burden of retroactively applying a later ruling by this Court finding that Section 841 establishes elements of the offense; the longer this Court waits to resolve the issue, the more this burden will be compounded.

Certiorari accordingly should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 16, 2003

APPENDIX

UNITED STATES of AMERICA, Appellee,

v.

BRIAN GOODINE, a/k/a DWAYNE GOODINE, Defendant, Appellant.

No. 02-1953

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

April 9, 2003, Decided

COUNSEL: Peter E. Rodway, with whom Rodway & Horodyski was on brief, for appellant.

F. Mark Terison, Senior Litigation Counsel, with whom Paula D. Silsby, United States Attorney, were on brief, for appellee.

JUDGES: Before Boudin, Chief Judge, Torruella and Lynch, Circuit Judges. LYNCH, Circuit Judge, concurring.

OPINION

TORRUELLA, Circuit Judge. A jury convicted Defendant-Appellant Brian Goodine of conspiracy and possession with intent to distribute cocaine base ("crack"), in violation of 21 U.S.C. §§ 841(a)(1) & 846 (2003).[1] By special verdict form, the jury indicated that the amount for each count was at least five, but less than fifty grams of cocaine base.

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[1] Goodine was tried with co-defendant Garry Julien, and both appeals were heard on the same date. Julien's appeal is addressed in *United States* v. *Julien*, No. 02-1765, 318 F.3d 316, 2003 U.S. App. LEXIS 1780 (1st Cir. Feb. 3, 2003).

The judge, however, determined that Goodine was responsible for 309.2 grams of crack, and sentenced him accordingly.

We are faced with two closely-related issues on appeal. First, Goodine alleges that the different penalty provisions under § 841(b) create separate crimes requiring the government to prove drug quantity beyond a reasonable doubt. Goodine asserts that he could only be sentenced pursuant to the jury's determination of drug quantity, but was erroneously sentenced pursuant to the judge's determination. Second, the judge imposed a mandatory minimum sentence based on drug quantity proved by preponderance of the evidence. Goodine raises an *Apprendi* challenge because that mandatory minimum sentence is higher than the sentencing guideline range to which he was exposed before the judge's finding as to drug quantity.

We find that drug quantity in § 841(b) is a sentencing factor, not an element of separate crimes. We also find that no *Apprendi* violation occurred here because the sentencing guidelines are not "statutory maximums" for purposes of *Apprendi*, and Goodine was not sentenced to a penalty greater than that authorized by the jury's finding. Goodine's sentence is therefore affirmed.

I. Introduction

Goodine does not dispute the jury verdict or the findings by the judge. He raises two legal challenges to his sentence. Goodine preserved these appeals at sentencing; we therefore apply de novo review. *United States* v. *Henderson*, No. 01-2392, 320 F.3d 92, 2003 U.S. App. LEXIS 2735, at *42 (1st Cir. Feb. 14, 2003); *United States* v. *Eirby*, 262 F.3d 31, 36 (1st Cir. 2001).

II. Drug Quantity as Sentencing Factors

A. Issue

The second subsection of the statute for drug possession with intent to distribute[2] delineates different penalty provisions based on drug quantity and other factors.[3] *See* 21 U.S.C. § 841(b). Three such provisions are relevant here. Defendants responsible for an unspecified amount of crack are exposed to a maximum sentence of twenty years under § 841(b)(1)(c), or thirty years if the defendant has a prior drug offense conviction. Defendants responsible for five or more grams of crack are exposed to five to forty years in prison, or ten years to life for defendants with a prior felony drug offense conviction under § 841(b)(1)(B). Finally, defendants responsible for at least fifty grams of crack are sentenced under § 841(b)(1)(A), which carries a possible penalty of ten years to life, or twenty years to life for defendants who have a prior conviction for a felony drug offense.

The jury convicted Goodine of possession with intent to distribute at least five grams (but less than fifty grams) of crack. Strictly following the jury's conviction, Goodine (who has a prior conviction for a felony drug offense) would be subject to a ten-year mandatory minimum sentence under § 841(b)(1)(B). However, the judge determined that Goodine was responsible for 309.2 grams of crack and sentenced him to the mandatory minimum sentence under § 841(b)(1)(A) -- twenty years.

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[2] Because the conspiracy statute, 21 U.S.C. § 846, adopts the sentencing scheme of 21 U.S.C. § 841, we need not address it separately.

[3] The statute also considers drug type, whether serious bodily injury resulted from the crime, and whether the defendant has a prior felony drug conviction. Our decision is limited to the issue of drug quantity, and leaves challenges to the other factors for another day.

Goodine asserts that § 841(b)(1)(A), (B), and (C) are different crimes with drug quantity as the differing element, and that because the government only proved beyond a reasonable doubt that he was responsible for five grams, he could only be sentenced to a ten-year mandatory minimum sentence under § 841(b)(1)(B). Goodine challenges the legal decision of the district court to sentence him under § 841(b)(1)(A) instead of § 841(b)(1)(B).

The government must prove every element of a crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). However, mere sentencing factors do not require such proof. *Patterson* v. *N.Y.*, 432 U.S. 197, 207 (1977) (holding that the State need not "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as . . . affecting . . . the severity of the punishment"). While the legislature is generally free to identify elements and sentencing factors, there are constitutional limits to this power. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 86 (1986). We must determine whether drug quantity is an element of offenses under § 841 that must be proved beyond a reasonable doubt, or merely a sentencing factor that may be determined by the judge by a preponderance of the evidence.

B. Relevant Cases

The distinction between "elements" and "sentencing factors" can be elusive, *see Apprendi* v. *New Jersey*, 530 U.S. 466, 494, and we admit that we have been wrong on similar questions before. *See United States* v. *Rivera-Gomez*, 67 F.3d 993, 996 (1st Cir. 1995) (holding that the federal carjacking statute identified only one crime; later rejected by the Supreme Court in *Jones* v. *United States*, 526 U.S. 227, 229 (1999)). This question is complicated by the Supreme Court's recent sentencing decisions. Before *Apprendi*, we held that drug-quantity delineations contained in § 841(b)(1) were sentencing factors that could be determined by a preponderance of the evidence. *See United States* v. *Lindia*, 82

F.3d 1154, 1160-61 (1st Cir. 1996). However, we have noted that the Supreme Court's decision in *Apprendi* "requires some rethinking of this approach." *United States* v. *Eirby*, 262 F.3d 31, 36 (1st Cir. 2001).

There is a split among our sister circuits who have considered this issue post-*Apprendi*. *Compare United States* v. *Wade*, No. 01-5210, 318 F.3d 698, 2003 U.S. App. LEXIS 2374, at *18 (6th Cir. Feb. 11, 2003) (holding that drug quantity under § 841 need not be proved beyond a reasonable doubt) *and United States* v. *Smith*, 308 F.3d 726, 740 (7th Cir. 2002) (same), *with United States* v. *Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000) ("If the government seeks enhanced penalties under 21 U.S.C. § 841(b)(1)(A) or (B), the [drug] quantity must be stated in the indictment and submitted to a jury for a finding of proof beyond a reasonable doubt."), followed in *United States* v. *Turner*, No. 01-11589, 319 F.3d 716, 2003 U.S. App. LEXIS 1270, at *10-11 (5th Cir. Jan. 27, 2003) *and United States* v. *Buckland*, 289 F.3d 558, 568 (9th Cir. 2002) (en banc).

This case presents us with a post-*Apprendi* opportunity to determine congressional intent regarding the drug quantity language of § 841. *Cf. United States* v. *Terry*, 240 F.3d 65, 74 n.9 (1st Cir. 2001) (not reaching the issue). We are assisted in this task by the Supreme Court's determination of congressional intent behind similar statutes. Five cases shape our analysis.

First, in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the Supreme Court found that a five year mandatory minimum sentence for visible possession of a firearm during certain enumerated felonies was a sentencing factor that could be determined at sentencing. *Id.* at 84. The felonies had maximum sentences of ten or twenty years, and the Court found that the "statute [gave] no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88. The

Court found that the instrumentality used in commission of a crime was a factor "that has always been considered by sentencing courts to bear on punishment" and therefore was not an element of the crime. *Id.* at 89. Although this was the first time the Supreme Court identified "sentencing factors" as distinct from "elements" of a crime, *McMillan* has subsequently been reaffirmed in light of recent sentencing decisions. *Harris* v. *United States*, 122 S. Ct. 2406, 2420 (2002).

In the second case, *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), the Court considered 8 U.S.C. § 1326(b)(2), which predicated an increase in penalty on a prior conviction of aggravated felony. The Court held that prior conviction is a sentencing factor rather than an element establishing a separate offense. *Id.* at 226-27. In reaching this conclusion, the Court engaged in a detailed analysis of the statute's language, structure, legislative history, caption and placement, *id.* at 230-35, as well as functional factors such as potential unfairness, the magnitude of the increase, and whether prior conviction is traditionally treated as a sentencing factor or an element of the offense, *id.* at 234-36.

In the third case, *Jones* v. *United States*, 526 U.S. 227 (1999), the Court construed the federal carjacking statute, 18 U.S.C. § 2119 (1994 ed. & Supp. V). At the time, the statute set three different maximum sentences: fifteen years for a carjacking, twenty-five years if serious bodily injury resulted, and life imprisonment if death resulted. *Id.* at 230. The question was whether the statute "defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict." *Id.* at 229.

The Supreme Court began with the language and structure of the statute, noting that the statute appeared to identify one offense with several penalty provisions. *Id.* at

232. The Court called this first glance an unreliable guide to congressional intentions because the statute identified steeply higher penalties conditioned on further facts "that seem quite as important as the elements in the principal paragraph." *Id.* at 233. The penalty range increased by at least two-thirds (from fifteen years to twenty-five years), and to as much as life imprisonment, based on a finding that substantial bodily injury or death resulted. *Id.*

The Court found the legislative history "unimpressive" because it supported either intent – of serious bodily injury meant as a sentencing factor or as an element of the crime. *Id.* at 237-39.

The Jones Court reasoned that carjacking is a type of robbery, and "serious bodily injury has traditionally been treated, both by Congress and by the state legislatures, as defining an element of the offense of aggravated robbery." *Id.* at 235. Finding serious bodily injury to be an element corresponded to maintaining the jury's role as more than a mere low-level gatekeeper: if serious bodily injury was merely a sentencing factor, "in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment." *Id.* at 244.

Finally, the Jones Court noted that if a statute is equally susceptible of two interpretations, one of which raises "grave and doubtful constitutional questions" that the other does not, a court should interpret the statute so as to avoid the constitutional question. *Id.* at 239. By holding serious bodily injury to be an element of a crime requiring proof beyond a reasonable doubt, the Court avoided a constitutional question. *Id.*

In the fourth case to resolve a similar issue, *Castillo* v. *United States*, 530 U.S. 120 (2000), the Supreme Court considered a statute prohibiting the use or carrying of a firearm in relation to a crime of violence. The Court found

that the provision increasing the penalty from a minimum of five years to a minimum of thirty years when the weapon was a machinegun required that the type of weapon used be proved beyond a reasonable doubt. *Id.* at 131. The Court noted that the first sentence of the statute, which included the type of firearm used, identified the elements of the crime, while the second sentence described "factors (such as recidivism) that ordinarily pertain only to sentencing." *Id.* at 125. The Court further found that firearm type is not a traditional sentencing factor. *Id.* at 126. "Traditional sentencing factors often involve either characteristics of the offender, such as recidivism, or special features of the manner in which a basic crime was carried out (e.g., that the defendant abused a position of trust or brandished a gun)." *Id.* The Court then found that asking a jury to resolve what type of weapon was used would not complicate a trial or risk unfairness. *Id.* at 127. The Court noted that the legislative history could have supported either view, but that the length and severity of the provision suggest that the language relating to different firearm types referred to elements of separate crimes. *Id.* at 130-31.

The final case offering guidance is *Harris* v. *United States*, 536 U.S. 545 (2002). There, the Supreme Court held that the statute for commission of a drug trafficking offense while using or carrying a firearm defines a single crime, and that whether the firearm was "brandished" or "discharged" is merely a sentencing factor to be determined by the judge. *Id.* at 2414. The Court found that the statute's structure suggested definition of one crime only, as the first paragraph listed the elements of a complete crime and the second paragraph described how defendants were to be punished. *See id.* at 2411-12 (interpreting 18 U.S.C. § 924(c)(1)(A)). The Court then considered "tradition and past congressional practice" and found that brandishing and discharging a firearm had not been treated as elements in other statutes, rather, they were classic sentencing factors. *Id.* at 2412. Further, nothing in the "text or history of the statute" rebutted the presumption drawn

from the statute's structure – that the statute identifies only one offense. *Id.* at 2413.

The *Harris* Court distinguished *Jones*, where the carjacking statute authorized "steeply higher penalties" based on whether injury or death resulted from the crime. *Id.* at 2412 (quoting *Jones*, 526 U.S. at 233). In the statute at issue in *Harris*, the consequence of a judicial determination that a firearm had been brandished or discharged was simply an increase in the mandatory minimum sentence. *Id.* at 2412-13. The Court found that the "incremental changes in the minimum – from 5 years, to 7, to 10 – are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration." *Id.* at 2413.

C. Application

Applying these cases to the drug statute at issue here, we begin with the language and structure of the statute. Section 841(a) lays out an offense that stands on its own, stating that "it shall be unlawful for any person knowingly or intentionally . . . to . . . possess with intent to distribute or dispense a counterfeit substance." *See* 21 U.S.C. § 841(a).[4]

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[4] The relevant provisions of the statute read:

> (a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally --
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
> >
> > (2) to create, distribute or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

The next subsection sets sentencing ranges for violations of 841(a) based on drug quantity, drug type, prior conviction, and whether or not serious bodily injury resulted from the use of the counterfeit substance. *See* 21 U.S.C. § 841(b). A

> (b) Penalties. . . . Any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1) (A) In the case of a violation of subsection (a) of this section involving . . . (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . .
>
> (B) In the case of a violation of subsection (a) of this section involving . . . (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . .
>
> (C) In the case of a controlled substance in schedule I or II, . . . such person shall be sentenced to a term of imprisonment of not more than 20 years . . . .

21 U.S.C. § 841(a)-(b).

straightforward reading suggests that part (a) identifies a crime and part (b) outlines different penalties for that crime. We have never directly answered this question, but we have previously stated that a switch from 841(b)(1)(B) to 841(b)(1)(A) does not affect the "substance" of the charge, *Eirby,* 262 F.3d at 38, and have referred to subsection (b) as designating "different sentencing regimes based on drug quantity" (and other factors). *United States* v. *Robinson*, 241 F.3d 115, 118 (1st Cir. 2001).

At the time § 841 was passed, Congress referred to the "sentencing procedures" as giving "maximum flexibility to judges," suggesting that Congress viewed the penalty provisions as sentencing factors. H.R. Conf. Rep. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576. The legislative history on this point is scarce, and others have found it unhelpful. *See United States* v. *McAllister*, 272 F.3d 228, 231 (4th Cir. 2001).

In addition to the statutory text and legislative history, we find here other considerations which have heavily influenced the Supreme Court in finding that certain facts are sentencing factors rather than elements establishing an offense. First, drug quantity is a classic sentencing factor. *See* 18 U.S.C.S. Appx. § 2D1.1(c) (2003) (determining Sentencing Guideline base offense level based on drug type and quantity). Like many sentencing factors, it goes to the "nature and circumstances of the offense." *See Castillo*, 530 U.S. at 126 (quoting 18 U.S.C. § 3553(a)(1)). Permitting the judge to make a determination as to drug quantity is not permitting the tail of sentencing to wag the dog of the substantive offense. *See McMillan*, 477 U.S. at 88. The government must prove beyond a reasonable doubt all the elements of § 841(a); in this case the jury found that Goodine knowingly or intentionally possessed with intent to distribute at least five grams of a counterfeit substance (cocaine base). This determination exposed Goodine to sentencing under § 841(b), ranging from five years to life imprisonment. The judicial finding relating to

drug quantity simply guides the judge for sentencing purposes within this range. This is a typical sentencing scheme.

Second, due to *Apprendi* limitations discussed in Part III below, a jury's determination will cap the maximum sentence a judge can impose, regardless of drug quantity determination. Our holding that drug quantity is not an element of § 841 means that a judge's determination of drug quantity can influence the mandatory minimum sentence imposed, and such incremental changes in the minimum are typical sentencing provisions determined by the judge. *Harris*, 122 S. Ct. at 2413. The *Jones* Court's concern that a jury would merely be a low-level gatekeeper is unfounded because the jury determination in fact sets the maximum punishment.

Third, drug quantity goes to how the offense is conducted, rather than the result of the crime. As such, it is more analogous to the statutes in which the Supreme Court identified sentencing factors. Drug quantity is "not necessary to the determination of whether [defendant's] conduct was 'criminal' or 'innocent.'" *United States* v. *Collazo-Aponte*, 281 F.3d 320, 326 (1st Cir. 2002). It therefore is more like a sentencing factor than an element. Finally, we note a practical result of our ruling. Were all facts contained in § 841(b) to be treated as elements, the statute would define as many as 350 different offenses. *See United States* v. *Promise*, 255 F.3d 150, 175 (4th Cir. 2001) (en banc) (Luttig, J., concurring). Such an interpretation causes difficulty we think Congress did not intend. We therefore find that drug quantity for purposes of § 841 is a sentencing factor that may be determined by a preponderance of the evidence.

III. Application of *Apprendi* to the Sentencing Guidelines

With a judicial finding of 309.2 grams of cocaine base, Goodine was exposed to 168-210 months imprisonment under the Sentencing Guidelines. However, because § 841(b)(1)(A) carries a mandatory minimum sentence of twenty years imprisonment for defendants who have a prior conviction for a felony drug offense and are guilty of possessing with intent to distribute fifty or more grams of cocaine base, the judge sentenced Goodine to twenty years in prison. Goodine raises an *Apprendi* argument because this mandatory minimum sentence exceeded the high end of his Sentencing Guideline range.

The landmark case of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*'s limitation on punishment beyond the statutory maximum applies regardless of whether the fact is considered an "element" or a "sentencing factor." *Harris*, 122 S. Ct. at 2410. A sentencing court may use the preponderance of the evidence standard to find facts that require the imposition of a specified minimum sentence, so long as that sentence does not exceed the maximum sentence provided by the relevant statute. *Id.* at 2419 (plurality opinion); *id.* at 2421 (Breyer, J., concurring).

We have held that *Apprendi*'s holding "applies only when the disputed 'fact' enlarges the applicable statutory maximum and the defendant's sentence exceeds the original maximum." *United States* v. *Caba*, 241 F.3d 98, 101 (1st Cir. 2001); *United States* v. *Robinson*, 241 F.3d 115, 119 (1st Cir. 2001) ("Theoretical exposure to a higher sentence, unaccompanied by the imposition of a sentence that in fact exceeds the otherwise-applicable statutory maximum, is of no

consequence."). If the disputed fact (here, drug quantity) influences the sentence, but the resulting sentence is still below the default statutory maximum, there is no *Apprendi* violation. *Robinson*, 241 F.3d at 119; *United States* v. *Houle*, 237 F.3d 71, 80 (1st Cir. 2001). This is so even if the judge imposes a mandatory minimum sentence. *Robinson*, 241 F.3d at 122.

Section 841(b) delineates several different default statutory maximums based on drug quantity (and other factors not relevant here, such as drug type and whether or not seriously bodily injury resulted): 20 years if no drug quantity is specified, 40 years for five or more grams of cocaine base, and life for fifty or more grams of cocaine base. 21 U.S.C. § 841(b)(1)(A)-(C); *See also United States* v. *Martinez-Medina*, 279 F.3d 105, 121 (1st Cir.), *cert. denied*, 537 U.S. 921 (2002) (identifying default statutory maximum under § 841(b)(1)(A) as life); *Robinson*, 241 F.3d at 119 (identifying default statutory maximum as twenty years under § 841(b)(1)(C), where no quantity had been determined beyond a reasonable doubt); *United States* v. *Baltas*, 236 F.3d 27, 41 (1st Cir. 2001) (same); *Smith*, 308 F.3d at 741 (finding a default statutory maximum of 20 years for more than fifty kilograms of marijuana under § 841(b)(1)(C)).

In this case, the jury found Goodine guilty of conspiracy and possession with intent to distribute at least five grams of cocaine base. The default statutory maximum was therefore 40 years. Because he was sentenced to less than that – 20 years – there was no *Apprendi* violation.

Goodine argues that the "prescribed statutory maximum" in his case is the top of the Sentencing Guideline range (210 months) and that his sentence of 240 months violates the rule in *Apprendi* because it is based on a drug quantity determined by a preponderance of the evidence only. We disagree.

If we adopted Goodine's argument, we would essentially abolish the guidelines because the jury would be required to make findings as to all facts that may be relevant to sentencing ranges and potential adjustments. Nothing in *Apprendi* or subsequent cases calls into question the validity of the Sentencing Guidelines, and "we do not believe that the Court would have set in motion such a sea change in the law of sentencing without explicitly addressing the issue." *Robinson*, 241 F.3d at 121.

The guideline calculations are not restricted by *Apprendi*'s rule. *See United States* v. *Knox*, 301 F.3d 616, 620 (7th Cir. 2002); *United States* v. *Norris*, 281 F.3d 357, 361 (2d Cir. 2002). The guidelines themselves state that where a "statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." 18 U.S.C.S. Appx. § 5G1.1 (2002). Nothing further is needed to impose a mandatory minimum sentence in excess of the guideline range, as the guideline range yields to the statutory minimum sentence. Here, the statutorily required minimum sentence of twenty years became the guideline sentence. Therefore, Goodine's sentence did not offend *Apprendi*.

IV. Conclusion

Goodine's sentence is **affirmed**.

LYNCH, Circuit Judge, concurring. I concur in the affirmance of the sentence. As to Goodine's argument that drug quantity under 21 U.S.C. § 841(b) is an element of a crime and not a sentencing factor, I think the argument is foreclosed by *United States* v. *Robinson*, 241 F.3d 115, 118 (1st Cir. 2001), *United States* v. *Eirby*, 262 F.3d 31, 35-38 (1st Cir. 2001), and *United States* v. *Lindia*, 82 F.3d 1154, 1160-61 (1st Cir. 1996). The claim that there is a violation of the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), is foreclosed by *Harris* v. *United States*, 536 U.S. 545 (2002).

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES
OF AMERICA

V.
BRIAN GOODINE

Case Number 2:01CR25-P-H-02
Entered on Docket : 8.1.2002
Peter E. Rodway, Esq.
Defendant's Attorney

JUDGMENT IN CRIMINAL CASE
For Offences Committed On or After Nov. 1, 1987

THE DEFENDANT:
Was found guilty on count(s) One and Ten (indictment) after a plea of not guilty.
ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 841 (a)(1) and 841 (b)(1)(B)	Conspiracy to Distribute and Possess with Intent to Distribute 5 or more grams of cocaine base	3/19/2001	One
21 U.S.C. §§ 841 (a)(1) and (b)(1)(B)	Conspiracy to Distribute and Possess with Intent to Distribute 5 or more grams of cocaine base	3/19/2001	Ten

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 247-73-6654

August 1, 2002
Date of Imposition

Defendant's Date of Birth: 6/10/1978

Defendant's USM No.: 04027-036
Defendant's Residence Address:
15096 South Radio Station Road
Seneca, SC 29678

D. Brock Hornby, United States District Judge
Name & Title of Judicial Officer

Defendant's Mailing Address
Cumberland County Jail
50 County Way
Portland, ME 04102

8/1/02
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of TWO HUNDRED FORTY (240) MONTHS on Counts One and Ten to be served concurrently.

The defendant shall receive credit for time spent in presentence detention.

The cost of incarceration fee is waived.

The court makes the following recommendations to the Bureau of Prisons: **The court notes that the defendant is a resident of South Carolina and recommends that he be incarcerated in a facility within close proximity to that area.**

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of EIGHT (8) YEARS.

The Defendant shall report to the probation office in the district which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If the judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (see forth below).

The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family obligations;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special guest of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

1. Defendant shall not use or possess any controlled substances or intoxicants to include joint, sole, actual or constructive possession; and shall participate in a program of drug and alcohol abuse therapy to the satisfaction of the supervising officer. This may include testing to determine if the defendant has made use of drugs or intoxicants. Defendant shall pay/co-pay for services provided during the course of such treatment, to the supervising officer's satisfaction.

2. Defendant shall at all times readily submit to a search of his residence, and of any other premises under his dominion and control, by his supervising officer, upon the officer's request when the officer has reasonable basis to believe that such a search will lead to the discovery of evidence of the defendant's violation of the terms of his supervised release. Failure to submit to such a search may be grounds for revocation.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following criminal monetary penalties:

	Assesment	Fine	Restitution
Totals:	$200	$0	$0

FINE

The court finds that the defendant does not have the ability to pay a fine. The Court will waive the fine in this case.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Payments shall be applied in the following order: (1) assessment.

A In full immediately.

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of

imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 1953

UNITED STATES,
Appellee,

v.

BRIAN GOODINE, a/k/a DWAYNE GOODINE,
Defendant, Appellant.

Before

Boudin, *Chief Judge*,
Torruella, Selya, Lynch, Lipez,* and Howard, *Circuit Judges*.

ORDER OF THE COURT

Entered: May 19, 2003

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
RICHARD CUSHING DONOVAN
Clerk.

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*Judge Kermit Lipez is recused from this matter.

[cc: Messrs: Rodway, Dratel, Sweeney, Zalkind, Terison and Ms. Price]